How to mix legal systems in a fruitful way? Some remarks on the development of a Ius Commune Europaeum through competition of legal rules

How to Mix Legal Systems in a Fruitful Way? Some Remarks on the Development of a *Ius Commune Europaeum* through Competition of Legal Rules

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Jan Smits
Maastricht University

I am delighted that I am given the opportunity to talk to you about one of the most interesting developments in private law of the last decades. It is the Europeanisation of private law, the emergence of a new *ius commune*, that is to be considered as one of *the* most fascinating tendencies in present day times. And, as is very often the case with fascinating things, one is able to discuss them in many different ways. One could discuss the desirability of the coming into being of a new *ius commune* (as has been done most notably by Pierre Legrand). One could discuss the economic or social effects if it (as many economists and political philosophers have done). One could even discuss the very idea of Europe itself (of course politicians and philosophers alike have taken many points of view on what actually **is** Europe - and now that we are in this magnificent place at the Vrijthof, allow me to make mention of Milan Kundera who has said that to him Europe is a place where you can sit in coffee houses all day, reading, writing and above all discussing things; in that sense our little seminar could also be characterised as a European venture). And of course, one could also discuss the *method* of creating a *ius commune*.

Today, I am not going to discuss the desirability nor the effect a *ius commune Europaeum*. I will, however, discuss methodology. I take the fact that a common European private law is desired as a starting point and will talk about the way to establish this. I have to admit that in the past I have sometimes been provocative in my writings, just to be provocative, just for the sake of discussion. Today however, I will be provocative as well, but not *just* for the sake of discussion. I really believe very much in the things I am going to say. Partly, I have said these things before, but today I will try to take the argument somewhat further. For

the sake of discussion, I have divided the argument into three different parts, each of them being equally important for the point I am trying to make. I will begin by presenting to you my theory as such on the method by which the *ius commune* should come about. Then, I will discuss the benefits of this method and finally some of its disadvantages, that - not surprisingly to you - will turn out to be no genuine disadvantages if you just look at them in a proper perspective.

How Legal Change Occurs

If legal scholars - but I suppose the same goes for professionals in any other branche - should be aware of anything, it should be the fact that experiences in the past have much to show us as to the solving of present day problems. It would be very inefficient not to make use of historical evidence in a specific field of expertise. This seems to be very much common sense, but what you see in practice is that many times people prefer to reinvent the wheel. Now, given the fact that we would like to establish a common private law in Europe, it is very surprising to me that usually, no inspiration is drawn from the *ius commune* that once existed in Europe in the 17th and 18th century and the coming about of that more or less uniform legal system.

Even more surprising it is to find that when today there still is a commonality between different legal systems in Europe, that this is not taken as a starting point for further research. So what I would like to suggest, is that we do look at previous experiences concerning the *ius commune* that once existed in Europe. And, moreover, that when there is already a common feature of several legal systems, that we do look at the way this common feature has come into being. Let me give you two examples of such common features that exist.

One common feature of many European private law systems, at least of the continental ones, is - in property law - the existence of a *numerus clausus* of real rights. From the North Cape to Palermo and from Porto to Odessa, *rights in rem* are part of a closed system: other rights than the (essentially) seven that have been recognised in law, cannot be accepted. This is, *e.g.*, the case in France (art. 543 CC) in Belgium (idem), in Germany and in The Netherlands (art. 3:81 lid 1 BW and art. 584 BW (oud)).

Another common feature of a totally different character, now in the field of contract law, is the existence of the very well known distinction between *obligations de moyens* and

obligations de résultat. This distinction is, although criticized in these countries as well, more or less accepted by the courts in France, in Belgium and in The Netherlands.

Now, here we have two examples of a common core. What should be interesting to anyone, fascinated by European private law, is: how has this common core come into being? Where does it come from? To know that, would be highly illuminating if you would like to profit from previous experiences. The answer is rather simple: both the *numerus clausus* and the distinction between two sorts of obligations have been accepted in one country (in the case of the *numerus clausus* and the twofold obligations-distinction, in 17th century Germany and 20st century Belgium respectively) and after a certain time have been taken over in other countries. In other words: one specific rule or argument was *transplanted* from one country to another. This phenomenon of `legal transplants' has for legal history been explored thoroughly by one of the most productive postwar legal historians, Alan Watson, who has stated that `most changes in most systems are the result of borrowing'. Of course, the reason for this borrowing was that a court, or a single judge, saw clearly the benefits of using an institution, or a rule, or an argument, used in another country and there being rather succesful, and then thinking it might serve the own legal system as well. It was thus not *ratione imperii* that the law became common, but it was the other way around: reason itself decided when a specific rule was considered to be so *good* that it could be transplanted into one's own legal system.

I will not dwell here upon the many, many historical examples of this pragmatic, not to say *practical*, method of private law unification. I could point at the classic rules on formation of contract (*e.g.* offer and acceptance), on the concept of `implied condition' (*condictio tacita*, `stilzwijgende voorwaarde'), on rules like *superficies solo cedit*, on the flexible content of *servitudes*, generally the same all over (continental) Europe. I could also point at modern instruments of commercial law and finance, such as *swaps*, *franchising* and *sale and lease back* that have been accepted in many countries with the leaving intact of more or less common characteristics.

I will not dwell either on the tendency that before the 19th century, legal transplants mainly took place within continental Europe, in mainly the 19th century they were extended to the Anglo-American world as well (having for a consequence that, *e.g.*, offer and acceptance were introduced into the common law by Pollock and Maitland, who considered themselves followers of Von Savigny) and that in the 20st century transplants have begun to flow mainly

in the other direction, Europe deriving benefit from American law. Europeans having to admit now that intellectual leadership in Western law is now with the United States. (But perhaps, if the signs of times are understood in the right way, there may be a change of climate. In the past few years, Western European private law has served much more as a source of inspiration for the new Civil Codes of the former East-Block countries than American law).

What I do like to stress here, however, is the lesson that can be learned from this historical survey. Without any doubt, it is a fascinating lesson: if most of the legal (private law) change up till now has occurred through borrowing from other countries, what we should do if we want to create a European private law, is to create a fruitful climate for these transplants to take place. A *ius commune* could then emerge in a more or less natural way, in a natural process of reception of law. The question, of course, is how to create such a fruitful climate. It is that question to which I will turn now.

Competition of Legal Rules

The contribution the Law & Economics movement can make to the emergence of European private law, is, in my opinion, large. If we - to use this very tempting terminology once more - transplant Law & Economics thinking to the legal unification process, you might get an argument like this: given the fact that similar legal problems arise all over the world (in the words of Pomponius: what exactly is *honeste vivere*, when is there a case of *alterum laedere*, what exactly is to be attributed *suum cuique*?), would it then not be a good idea to have the legal rules, concerning these problems, compete with each other? If you would allow that to happen, a `market' of legal rules would emerge. On this market of `legal culture', where rule suppliers (the different legal systems) seek to satisfy demand, ultimately, the most efficient rule will prove to be the winner. It is this rule that will in the end emerge as the best rule of European legal systems. Would we be prepared to accept this argument, it would most of all force us to accept a new and ambitious legal *mentalité*. This mentality would have an international ambit; if accepted, it would change the outlook of private law in Europe totally. It would mean that national courts would not only have themselves inspired by national law, but also by other legal systems. It would mean that the Dutch Hoge Raad would not only refer to its own decisions but also to those of the French *Cour de Cassation*, to those of the German *Bundesgerichtshof* and to those of the English *House of Lords*. It would also mean that in a case of tort

law not only *Asser-Hartkamp III* would be a source of inspiration, but also *Winfield & Jolowicz on Tort*, *Ghestin-Viney's La Responsabilité* and *Cornelis' Beginselen van het Belgische buitencontractuele aansprakelijkheidsrecht*.

Of course, the correct choice between the rules of the different legal systems can as a matter of principle only be made if there is knowledge of every available rule. If this knowledge does not exist, it will after all not be possible for the most efficient rule to come out on top. So, the more attached to its own national solutions the legal system is, the less efficient it should be considered to be. And the more a legal system has (or its - to quote Max Weber - `Rechtshonoratioren' have) an internationalist *mentalité*, the more efficient it is.

The result of accepting this analysis *and* future method of obtaining a European private law would be, in one word: *unification*. If the legal marketplace functions well, one rule will eventually be singled out by the `buyers' as the best. We may not be aware of this, but the fact that in the majority of European countries private law is now already more or less uniform, is the very result of this process. The former *ius commune*, which those adhering to a European private law so eagerly like to refer to, originated in more or less the same way, rather than by having been mandatorily imposed by a centralist national authority. I admit: it may be the case that, historically, more influences account for the unification process than just choosing between various rules by the `Rechtshonoratioren', but for the future, this method should be the prevailing one for various reasons I will come back to later.

So, I propose to you this afternoon: a method, *theoretically* embedded very firmly in Law & Economics theory, for which we have *historically* very convincing evidence and that is *practically* very easy to implement. All that we need, is a change of mentality in Europe: we need to have practitioners, *e.g.* courts, lawyers, business people who are willing to give up their adherence to their national laws and to look at solutions, arguments, rules from other countries as well. Of course, this mentality change may need some time as well, but it is possible. I like to use here the metaphor of free movement of legal rules because that is exactly what it is: let the rules freely cross national borders and European legal paradise will be there. And eventually, a mixed legal system will emerge. It will be mixed for it will have aspects of various continental legal systems, but also of the civil law and the common law. It has been done before: the South-African and Scottish experience show us the - very tempting - way. Of course so tempting because most legal scholars agree that both South-Africa and

Scotland have a legal system of `peculiar excellence' (Osborne), one `of genius' because it is the product of a long process of `critical picking and choosing, simplifying, adapting and rationalising' from the great legal traditions of Western civilisation (Lord Cooper of Culross). There, at least in South-African law, courts are, and sometimes all in the same case, referring to Larenz, Viney, Kötz, Grotius, Gaius and Birks.

I will not say much further about the specific approach within the Law & Economics movement that the method of competition of legal rules fits in most. I should add that the theoretical underpinning of a legal transplants-approach is of course very important, but mainly an aspect of the theory to be discussed by Law & Economics scholars and not by me. I think I can confine myself to the very broad acceptance of the general idea. And the general idea says that a practice that is willing to accept the internationalist *mentalité* I propose, will reach the desired results. In that sense, the proposed theory is rather practical.

The Benefits of the Approach of Competition of Legal Rules

Up till now, I have only been talking about the approach of competition of legal rules as *a possible* way towards a new *ius commune*. I did not yet make clear why this method should be considered to be *the better* one, compared to the many other suggested roads towards a European private law. To give you an idea of those roads: legal scholars have suggested that a *ius commune* could be reached, *e.g.*, through the drafting of treaties, through legal science itself, through legal education, by enacting a European Civil Code, by making soft law as a model (as is done for contract law in the case of the Lando and Unidroit Principles) and - within the framework of the European Union - by making more Directives than is done at present, by making regulations (at least in the field of contract law) and by giving a larger role to the European Court of Justice or even to the European Court of Human Rights in Strasbourg (that might be able to influence national legal systems much more than it does now, also in the field of property law).

Allow me to embark upon the venture of showing why the method of competition of legal rules is the most apt one to create a *ius commune* in Europe. At least three different reasons in favour of this method could be given.

In the first place, by having free competition of legal rules, unification happens in practice itself. Practitioners (or, for that matter, *Rechtshonoratioren*) themselves decide to

what extent they are willing to borrow from another legal system. Thus, it is not an authoritatively imposed text (as would be the case with the enactment of a European Civil Code or even by having Regulations or Directives), which carries in it the risk of failure, since a text alone does not produce uniform law. In particular Pierre Legrand has emphasised the many risks of `just' enacting a Code. Assuming that this is legally possible within the European Union (after all `just' a matter of political will within the Union), the effect will most definitely not be convergence of legal systems because there is more to law than only texts. In particular the great divide between common law and civil law cannot be bridged by having a uniform text, as even the very existence of a codification is so contrary to the character of English law that it will not be acccepted there. This very real problem can be solved by leaving the unification process to practice itself: then it is left to the national legal *Gesellschaft* to decide which foreign rule may be transplanted, taking into account the legal culture of the importing country. In this way, you get the best of two worlds: the inherently superior rule of one (exporting) European legal system *and* no infringement of legal culture in the importing legal system. In this way, tribute is paid to both the civil law and the common law *mentalité*.

This is not to say that legal science has no role to play in the proposed method of competition of legal rules. (To suggest otherwise would be stupid because it would make most of us present here unemployed.) Legal science should play the role that it to a certain extent already has. It should try to compare the different private law rules in Europe and come up with suggestions for common rules. Thus, it helps to create a marketplace of legal rules. It should however *not* be concerned with the making of a European Civil Code itself. That would be a task for politicians who do not grasp the signs of time and who do not understand that to adhere to a European Civil Code is - to quote Pierre Legrand once more - a view straight from the `Napoleonic era, a legacy of the simplified and mechanistic world view entertained by positivists'.

In the second place, a benefit of having legal rules compete with each other, is that uniform law will only come about in those areas of private law where it is really needed. The European Parliament has called for the enactment of a European Civil Code in so far as required by the Internal Market. I agree for the latter part of this call: we only need uniform law for a rather limited area of private law. To quote Kötz: `Warum aber in aller Welt (…) muss denn eine Ehe unter Sizilianern nach den gleichen Regeln geschlossen oder geschieden

werden wie eine Ehe unter Dänen oder Iren?' Through reception of law, uniform law will only come about where this is really needed, mainly in the field of contract law and security rights. To have an entire Civil Code would entail the risk of failure, perhaps in these specific fields because of the then centralistic imposure of `uniform' law upon member-states, but most certainly in other fields of law, where unification is not needed at all.

In the third place, the method of unification by mixing legal systems has the inherent advantage that change within the legal system is not difficult to accommodate. In codified law, legal change demands as a matter of principle statutory intervention. There is however no need for the authorities to do anything if you have free competition of legal rules. Would you use private law to implement pure economic goals (as seems to be the case with the in a very classical way designed Lando Principles), you could borrow as much arguments from other legal systems in favour of these goals as would be the case if you would like to implement goals, related to a more social policy. Arguments in favour of will theory and protection of weaker parties are after all both present in *proto*-European *ius commune*. This means that if you want to adjust (parts of) your private law system to another political goal than you did in the past (*e.g.* influenced by the famous *Zeitgeist*), all you have to do is to have yourself inspired by other rules than you were inspired by before. Thus, unification will be an ever ongoing process; one cannot say it will ever come to a stand-still since the goals we want to attain with the law change constantly. Unification then is much more an ideal to be attained than a reality to be implemented.

What I do admit, is that we cannot have the *perfect* market-situation in making European private law. At least one correction to the market should be made: where the interests of weaker parties (mainly consumers) are endangered, State intervention is possible. The instrument of European Union Directives seems to be the best method to establish this protectionist mechanism.

The Fallacies and Limitations of the Approach of Competition of Legal Rules

As you can all imagine, I am not the one person from whom it can be expected to criticize the theory I just exposed you to. I have however been so lucky to have already provoked some criticism on my ideas on creating a *ius commune Europaeum*. I am going to say something about this criticism, but only in a very concise way and definitely not discussing all objections

that are possible. I hope we will come back to that later.

What could be brought forward against the proposed method, is that it will take a very long time for a uniform rule to evolve through the free movement of legal rules. The `natural process' could take centuries. I doubt this is right.

First of all, I could point at the many examples of borrowing that have taken place in the past and that have not taken so long. The `reception' of the concept of offer and acceptance and of will theory in English law in the 19th century did not take more than 50 years. The `trust' is now in a process of being recognised in continental European law and I would not be surprised if within 30 years or so, we would have a totally accepted legal institution in The Netherlands very similar to the Anglo-American trust.

Secondly and more important: in my view, to say it will take a long time is a spurious argument. The alternative would be the imposition of a uniform text which will not automatically result in uniform law, but conversely will have an adverse effect because the market will be distorted: those using the uniform text will be inclined not to consider possible other rules and solutions. So there is no real choice to come to unification, or rather it is between *either* a European Civil Code, creating only a semblance of uniformity, *or* for no Code at all, but then you have a law, inevitably more or less slowly evolving from the free movement of legal rules.

As a second argument against my theory could be brought forward that, by using Comparative Law & Economics, I am - in a utilitarian way, it has been said - experimenting with legal rules and in doing so also experimenting with people. The European Citizen, it is asserted, will be the victim of courts that `ad random' choose for rules from all over Europe. The same line of reasoning is practiced by those who assert that competition of legal rules leads to legal uncertainty because you can never be sure which rules will be applied by the courts. I would answer these critics by saying that it is definitely *not* ad random that the courts make their choice for a specific rule. They have to do this, just as they are doing this now, in a careful and skillful way. I must admit that I have used in the past the wording `trial and error' for what the courts in my method have to do. That may indeed not be such a good expression for what I meant to say. What courts should try to do, is to find the best of all possible solutions and of course they should not be allowed to say: `Hey, let me try Finnish law for a change and see how the parties and the legal community react and in case of error I

will use Portugese law next time'. That would indeed be legally and morally wrong, but it is not what I am saying. To the argument of legal certainty I hope to come back in the discussion.

In the third place, one could criticize the theoretical embedding in Law & Economics Theory. This has been done in an eloquent way by Olav Haazen and he has been criticized for that by Holzhauer and Kerkmeester. What I consider to be important here is the criticism concerning the hypothesis of having complete information. In the ideal situation, Comparative Law & Economics could only lead to the emergence of the best rule if every single court (or *Rechtshonoratioren* in general) within the European Union knew everything about the 15 different legal systems. That is - of course - a pure fiction. But the more knowledge the courts have about foreign law, the bigger the possibility we are close to the best rule and not working with second, third, etc. best rules.

Finally, one could raise the objection that in my method the lion's share of the unification process is left to the courts and that these are left with a far too big responsibility. Here, I disagree with Ugo Mattei who has evaded this problem by arguing that in the end, after a period of free market competition of legal rules, unifying *codification* should take place and a classical method of deciding cases can take place. I already said that this would lead to a non-flexible system, thus destroying one of the advantages of the competition-method. I already emphasised as well that I do not believe in this sort of centralistic unification, that might not have the desired effect at all because it is so very much contrary to the common law *mentalité*. So I do believe in unification through the courts, be it that it is to the European Law Faculties to show the way to the various solutions in different European countries. This process has really just begun and will - if the signs are understood correctly - take a tremendous course in the years to come. The job to be done by the courts will then be much easier than it appears to be now.

As I do not accept these objections to be very real, I do however submit that there are limitations to the method of competition of legal rules. The most important limitation is that European private law can only come about if an internationalist *mentalité* in Europe does emerge. Without the idea, held in legal practice all across the European Union, that it is useful to look at foreign law, we will come to nothing. This is what Alan Watson has called the element of `pressure force', one of the 9 decisive factors he distinguished as determining legal

change: the power to change the law is dependent upon a recognizable group of persons who believe that a benefit results from a practicable change in the law. If this group is not available (and that may very well be the case, *e.g.* in France and in Spain), nothing happens. But then again: would `uniform' law be imposed by a centralistic authority in these countries, the impact would probably even be counterproductive, disturbing the national legal system.

To sum up: convergence of legal systems is not a political nor a scholarly venture. It is a practical thing. So if we want to have a truly unified private law in Europe and are aware of the limitations unification inherently has, I think the best method would be to have legal rules compete. The *ius commune Europaeum* would emerge where it is needed the most: in legal practice itself.

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